United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

427

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,156

UNITED STATES OF AMERICA,

Appellee,

v.

LAWRENCE M. GREEN,

Appellant.

Appeal from the United States District Court
for the District of Columbia

Joseph Paull,
Counsel for Appellant
(Appointed by this Court)
1730 Rhode Island Avenue, N. W.
Washington, D. C. 20036
223-4580

Cr. No. 1420-68

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§ 22-2801 D. C. Code (1961), Rape. Definition and penalty.

Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: Provided further, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 808; Apr. 19, 1920, 41 Stat. 567, ch. 153, § 808; Jan 30, 1925, 43 Stat. 798, ch. 115, § 1.) 2

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Federal Youth Corrections Act 18 U.S. Code 5010(c)

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter..2

REFERENCES AND RULINGS

Pleadings: Motion For New Trial

Presentment

Indictment

STATEMENT OF ISSUES PRESENTED

I. Whether there being no issue as to sexual intercourse and identity of the parties, the jury was misled and confused by an instruction on corroboration, with specifications presented.

II. Whether the Court was biased and so openly biased that the defense was hampered and the jury influenced.

III. Whether, the opportunity being present, the Court improperly refused to call a jury panel that would never have seen that the defendant was imprisoned.

IV. Whether before the jury began deliberating, the Court should have instructed its members to give deference to the opinions of each other.

V. Whether, the jury could justifiably find beyond a reasonable doubt that there was no consent.

VI. Whether the indictment was void on its face.

- - - - -

This case under this or any other name has not previously been before this Court.

STATEMENT OF THE CASE

Appellant was indicted on a charge of raping one Sharon L. Taylor, forcibly and against her will (22 D.C. Code 2301). He was tried by jury, Judge George L. Hart, Jr. presiding, and convicted as charged, and sentenced to 15 years in custody, under the Federal Youth Corrections Act 18 U.S. Code 5010 (c).

According to the complainant's testimony, the defendant and complainant had been childhood sweethearts in 1964, and in June 1968, met again at a high school prom, when the defendant was 21 years of age and the complainant was 18 years of age. The defendant telephoned the complainant on June 12, 1968, and she agreed to a double date. They went to the apartment of the defendant, his roommate being the driver of the car and the other male in the double date.

The complainant further testified in direct examination that there was some drinking and dancing and the defendant and complainant necked and 'french kissed' a few times (Tr. 35) while slides were being shown in a darkened room. The other couple left and the defendant and complainant repaired to the bedroom (Tr. 37) where they reclined on their arms facing each other (Tr. 39). The defendant then said: "What would you say if I told you that I wanted your body..." The complainant

testified that she answered: "I'd laugh and say no." (Tr. 40) She said they remained on the bed talking (Tr. 40). They heard the other couple return and they left the bedroom (Tr. 41). The other couple left again and the defendant and complainant returned to the bedroom, hand in hand, he having said, "come". They lay atop the bed and alongside each other, she face down and he face up (Tr. 42). He again suggested sexual relations and begun undoing her zipper on her short culotte dress. According to the complainant, she resisted and tried to leave, whereupon the defendant hit her repeatedly in the face with his open hand, she thought, but it might have been with his fist (Tr. 43). She became dizzy. They conversed during the struggle. While he was having intercourse with her, she was trying to talk to him, to make him stop and let her go home (Tr. 47). She was never asked nor did she state that she resisted to the utmost of her power.

The complainant further testified that after the intercourse, he ordered her to be out of the apartment in three minutes. She pulled her torn dress around her, was refused the use of a jacket, grabbed her purse and was shoved or kicked out the door (Tr. 48). She was admitted to an apartment in the next building, said she was beaten but not raped (Tr. 50). Her mother was telephoned and was told by the complainant she was

not raped. She was driven home and again said that she was not raped (Tr. 51). When her mother promised not to call police, the complainant said she was raped (Tr. 51). She testified that she had been a virgin on the night of the intercourse.

An examining physician said she was "moderately beaten" (Tr. 70) about the face. His medical opinion to a "reasonable certainty" was that there was more than one blow to her face (Tr. 65-70). Photographs introduced in evidence showed her face to be badly bruised from the eye to the mouth on one side only. The physician found no evidence that she was a virgin at the time of the intercourse. Semen was found in her vagina, but there was no evidence of a forced penetration or of a recent rupture of the hymen (Tr. 70-75).

The defense was consent, the defendant testifying to torrid lovemaking followed by one coitus, with withdrawal and then a second climax, with the defendant being prevented from withdrawing in time. The complainant, the defendant testified, berated him for not withdrawing, wanted to know what she should say if she became pregnant and asked whether he treated his exfiancee the same way. He became angry and hit the complainant once with his open hand hard, and ordered her to leave, but he did not think she would do so. He saw her outside and said he

would order a cab for her, but she did not respond (Tr. 322-344).

Several witnesses testified that the complainant's reputation for chastity and moral character was bad (Tr. 331, 391, 405). One witness testified they had been engaged in 1967, and he had intercourse with her more than five times (Tr. 453, 457).

The presentment in the case dated August 21, 1968, and filed September 11, 1968 charged appellant with rape and was signed Margaret H. Seamon, Foreman. The indictment in this case charging appellant with rape filed September 11, 1968, was signed Martin Blanchow (best reading of handwriting). Foreman.

When the case was called for trial, defense counsel pointed out that the jury panel present in court had seen that the defendant was in custody. Counsel asked for a new panel, which request was denied (Tr. 3-4). However, the court soon

ordered that henceforth the jury would enter the Court after the defendant and leave before him.

After extensive cross-examination of the complainant, the Court said in front of the jury, "Mrs. Bowman, this bull-dogging has got to stop. Now, she said he threw her out. If he threw her out he didn't keep her from going. You need not ask that question time after time." (Tr. 209)

At the bench, he termed defense counsel's examination of the complainant, "cruel and merciless" (Tr. 215).

The Court played a major part in the cross-examination of a central character witness. (Tr. 389-393), and at the bench during that cross-examination suggested a line of questioning to the prosecutor in so many words:

THE COURT: Well, ask him. Hasn't he discussed other girls, what their reputations were? Wasn't it customary for these kids to get together and tear down people's reputations?

(Tr. 396).

After the prosecutor attempted to follow the line set up by the Court, the Court then cross-examined further in these terms:

THE COURT: Did you ever talk about any other girl except Sharon?

THE WITNESS: I guess we talked about all the girls.

THE COURT: I thought you said you didn't talk about the girls.

THE WITNESS: Sure we talked about them, but I mean we don't sit around and have a session about a girl.

THE COURT: Did any other girls except Sharon have a bad reputation?

THE WITNESS: Sure, plenty of girls have a bad reputation.

THE COURT: I see. Now, three or four years ago

you vividly remember this conversation with Sharon about Lawrence Green.

Would you tell us some other conversations you remember with Sharon about that time?

THE WITNESS: Some other conversations concerning Larry Green?

THE COURT: Concerning anything.

THE WITNESS: We didn't have too many conversations.

THE COURT: This is the only conversation you ever had?

THE WITNESS: No, we talked, but I can't remember.

THE COURT: What did you talk about?

THE WITNESS: Anything.

THE COURT: Well, tell us some of the things you talked about besides Larry Green.

THE WITNESS: We talked about school, we talked about people in the neighborhood, we talked about everything.

THE COURT: What did they say about the people in the neighborhood and what people did they talk about in the neighborhood?

THE WITNESS: Talked about and say anything about the school, didn't like school No kid likes school. We all talked about that.

THE COURT: Can you tell us some of the people you talked about in the neighborhood and what you said about them? In other words, this is the only conversation you specifically remember; is that right?

THE WITNESS: It stuck in my mind for some reason. Well, I don't even remember the whole conversation. I remember that one line distinctly because I know exactly where she was standing, I know exactly where I was. I was just getting ready to leave. It was right after I was through seeing her. I saw her for a couple weeks, and I remember distinct-- I can see her in my mind, I remember her distinctly saying that.

THE COURT: Well, you remember it then because she was through saying that.

THE COURT: Well, you remember it then because she was through seeing you?

THE WITNESS: That might be it too, I don't know.

THE COURT: All right. (Tr. 397-400)

The Court, in the opinion of counsel, harangued a Legal Aid investigator before the jury (Tr. 419). Then after the interrogation of a second investigator, the Court asked a series of questions clearly designed to highlight inconsistencies between what the defendant had told the investigator and what he had said in his court-testimony. (Tr. 436-438) Soon thereafter, the Court pointed out at the bench the importance that he attached to the inconsistencies he had himself adduced and emphasized, as well as unequivocally stating his personal belief in the defendant's guilt:

THE COURT: You have inconsistency after inconsistency with this man's testimony, and what he told the Legal Aid people. You have this woman beaten brutally with a doctor saying she was hit more than once. You have her clothes torn off. What in the world . . . (Tr. 442).

Again, a little later, at the bench, the Court again pointed out what had been brought forth by his own examination:

THE COURT: "Of course, on one occasion you have your separate stories that he told between the investigator and what he testified to on the stand." (Tr. 449).

At the bench, the Court advised the Government as follows: "Mr. Harris, it seems to me if you are going to put on more character witness, you are going to play right into Mrs. Bowman's hand, which is a trial of this grrl's character and not rape. To me, it makes no sense". (Tr. 443)

When the defense produced a witness to testify to specific acts of intercourse with the complainant, the Court asked for his address, and in explanation said at the bench to prosecutor, "I am trying to get his address so you can call your office and ask that they check into this man and see if he has a criminal record and what the situation is on him. People that come in bragging and telling" (Tr. 449). There was no criminal record produced.

When the witness, a Moroccan with a scant knowledge of English said, "I don't understand the question, I'm sorry", the judge admonished him, "You will answer the questions and not ask them. I said you will answer the questions and not ask them." (Tr. 459).

In charging the jury, the judge specified eight items that the jury might consider as to corroboration. Of these, at

least four were isolated instances of damaging Government evidence and went only to the fact of intercourse, which was uncontested. (Tr. 506-507). The defense objected to the corroboration charges as confusing and misleading and to the Allen charge (Tr. 510-511), given prior to the jury's retiring.

/ I. [illegible] TO INSTRUCT THE JURY AS TO THE NECESSITY OF CORROBORATION, PARTICULARLY AS GIVEN BY THE COURT.

(Please read particularly Tr. 264, 506-9, 510-11, Motion For a New Trial.)

It is clear that consent was the only issue. The burden, of course, was on the Government to prove all necessary elements, including non-consent.

After the judge instructed the jury, defense counsel reminded the Court that she had in chambers said the corroboration charge would be unnecessary and confusing (Tr. 510-11). In her motion for a new trial she asserts that she had objected in advance to the instruction. No transcript of what transpired in chambers is available, unfortunately, but it can be assumed that objection was made in advance, or at the very least, appellant did not ask for the instruction. Appellant certainly objected afterwards and had good reason to object to the instruction as given.

The judge gave eight instances of what he termed "matters" which he said the jury may or may not consider as corroborating the complaining witnesses' testimony (Tr. 506). Each of these matters tended to corroborate the "crime of rape" and were harmful to the defense. The instances were:

1. The length of time between the alleged rape and

the time the complaining witness communicated her allegations of rape to a third person.

2. Whether or not and under what circumstances, if any, complaining witness abandoned or left certain clothing in the defendant's apartment.

3. The complaining witnesses physical condition shortly after the alleged rape.

4. The complaining witnesses nervous condition shortly after the alleged rape

5. The condition of the complaining witnesses clothing shortly after the alleged rape.

6. The testimony of Doctor Bergman as to the cervical and urethral smears from the complaining witness taken shortly after the alleged rape show intact sperm.

7. The testimony of Special Agent Wright as to the finding of male sperm on the cullottes worn by the complaining witness at or about the time of the alleged rape.

3. The testimony of Doctor Bergman as to the bruises on the complaining witnesses face after the alleged rape, and his opinion with reasonable medical certainty as to the number of blows required to produce those bruises. (Tr. 506-507)

In a case where the fact of intercourse was uncontested, no instruction at all on corroboration of that fact

should be given, Arguably, perhaps, an instruction on corroboration of force would be appropriate, but the instruction as given certainly was not limited to this element. Two of the eight factors listed dealt only with the fact of intercourse and were unrelated to the use of force; i.e., the finding of intact sperm within the cervix and uretha and the finding of male sperm on the complainant's clothing. Two more of the factors were ambiguous and did not necessarily go to the fact of forceful intercourse, i.e., the complainant's nervous condition (which could be as easily caused by the argument she had with the defendant as by forcible intercourse), and the condition of the complainant's clothes (which the defendant testified were ripped in mutual haste to disrobe).

The likely effect of the instruction was to confuse the issue by enlarging it and to make it appear there was a contest as to the fact of the intercourse. In giving the instruction, the judge intruded himself into the case in such a way as to weaken the defense strategy, to indicate to the jury his obvious and almost stated belief, that the defendant was lying and was guilty.

This Court recently considered the points of consent and the necessity for corroboration in the case, Borum v. United States, No. 20,270, 409 F.2nd 433 (1967), Petition for Rehearing En Banc and before the Division Denied Feb. 14, 1969.

In Borum, the Court said in a footnote (p. 437) that corroboration is required of both the corpus delecti and the identification of the attacker. "This dual requirement, where applicable, contemplated reasonable instructional precision conducive as to the jury's understanding as to the need for corroboration as to each." (emphasis added)

The corroboration instruction in the instant case was designed for the cases where intercourse is in issue and was not "applicable" here. The jury's focus was taken from the issue of consent and instead placed on the act of intercourse, which appellant admitted and about which there could be no dispute. The required precision is lacking.

Oddly, the judge omitted any mention of corroboration of non-consent being required. (See also Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946) and Miller v. United States, 120 F.2nd 968 (8th Cir. 1941) on the necessity of clear, accurate and fair instruction.)

While he had given in the eight "matters" a prosecutor-favoring vivid condensation of the Government's case, he never did give the indicia of non-consent.

He was required, of course, to give a fair and balanced charge. His damaging (to the defendant) "matters" should have been balanced in his charge by "matters" brought out in the

trial which were favorable to the defendant. Such circumstances as these:

1) The uncontraverted fact that in the hours immediately following the incident, thrice said she was not raped when specifically asked.

2) The uncontraverted fact that there was no tearing or bruising of her private parts.

3) The testimony of Dr. Bergman that there was no evidence of forcible entry.

4) The fact that the physical evidence did not support the prosecutrix claim that she was a virgin.

II. THE DEMEANOR OF THE JUDGE PRESENTED TO THE JURY AN APPEARANCE OF BIAS AND PREJUDICE WHICH HAMPERED THE DEFENSE AND INFLUENCED THE JURY.

(Please read Tr. 209, 215, 408, 419, 436-438, 443, 449, 450, 459, 483, 484, 506-507, Motion for a New Trial.)

At the conclusion of the trial, the defense formally moved in writing for a new trial, on the grounds, in part, that "the trial judge revealed to the jury his bias against the defense." The motion was denied without a hearing and is filed as part of the record on this appeal.

The motion, bearing the signature of the two defense counsels, asserts: "Throughout the trial, at the bench and off the record, the Court indicated his belief in the defendant's guilt. This belief was finally and fully transmitted to the jurors in the case by the Court's actions during the presentation of the defense case."

Again, the motion asserts that defense witnesses were "cross-examined by the Court in a tone of voice and in a manner which clearly evidenced disbelief and discounted the importance of their testimony." Again, the motion asserts that at a bench conference the Court "in a loud voice" disparaged the effectiveness of certain defense testimony. As to the instance in which the Court admonished the witness of Moroccan birth, the motion asserts: "The Court shouted at

the witness with a display of anger and disgust . . ."

The full impact of the judge's behavior cannot be ascertained from the transcript of the trial proceedings, which of course do not portray what was said off the record or the judge's tone of voice, loudness of voice or facial expressions.

The "cold record" of the transcript alone is, however, sufficient to merit reversal. The cases calling for that reversal were explicated in the motion for a new trial, which is adopted as part of this brief, as follows:

In 1894 the Supreme Court stated:

> It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling. Starr v. United States, 153 U.S. 614, 626, 38 L.Ed. 841, 846 (1894).

In the instant case there were numerous separate instances of activity by the trial judge which could have influenced the jury. Much as in Jackson v. United States, 117 U.S. App. D.C. 325, 329 F.2nd 893 (1964):

> (N)o single comment or question, or line of questioning, can be regarded as prejudicial, but the cumulative impact of all of the trial judge's activist participation could well have been prejudicial at the very least and could have led jurors to give undue weight to points treated by the judge.
>
> On the whole record we cannot say, with that degree of assurance required in a criminal case,

> that the activities of the trial judge may not have prejudiced the defendant, notwithstanding the strong evidence presented against him. Jackson v. United States, 117 U.S. App. D.C. 325 F.2nd 893 (1964). (Emphasis added).

The Court in Jackson reversed for a new trial.

The cross-examination of an investigator from the Legal Aid Agency, for instance, in which the trial judge cross-examined on four specific inconsistencies and emphasized them for the jury falls squarely within rule of Frantz v. United States, 62 F.2nd 737 (6th Cir. 1933) (cited and quoted in United States v. Farmington, __U.S. App. D.C. ___, 389 F.2nd 357 (1968). Reiteration by the trial judge of evidence damaging to the accused called forth the following statement by the Court at pp. 739:

> ". . . the District Judge was quite evidently convinced of the guilt of the accused and took no pains to avoid disclosure of this fact to the jury."

In the instant case defendant's evidence seeking to cast light on the character of the prosecutrix was discredited severely as a result of the trial judge's comments on that evidence, comments to defense counsel for presenting such evidence, and by partisan cross-examination of the witnesses presenting that evidence. In Blunt v. United States, 100 U.S. App. D.C. 266, 244 F.2nd 355 (1957), the Court held such

activity by a trial judge as regards psychiatric testimony required reversal because it impinged upon the defendant's constitutional right to a trial by jury. The Court stated that in questioning witnesses the trial judge should not be argumentative, should not be an advocate, and should not urge his own view of the guilt or innocence of the accused. Blunt v. United States, 100 U.S. App. D.C. 266, 244 F.2nd 355 (1957). Gudger v. United States, 114 U.S. App. D.C. 263, 314 F.2nd 268 (1963). Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2nd 394 (1950).

Finally, defendant moved for a new trial because the interest of public justice requires, regardless of prejudice to the defendant, that a trial be conducted by one who is a "... disinterested and objective participant in the preceedings." Young v. United States, 120 U.S. App. D.C. 312, 346 F.2nd 793 (1965). Although the Court gave a careful instruction to the effect that the jury should not be influenced by any actions by the Court, this would not cure the course followed. Blunt v. United States, supra.

At this point the motion alleging bias by the trial court stands unrebutted and undenied. If this Court feels the transcript is inadequate to demonstrate that the judge acted in such a manner that the defense was unduly hampered and/or

the jury hampered in reaching a verdict uninfluenced by judicial pressures, even though they might be spontaneous or well-intended, this Court may act to supplement the record. It may do so by the affidavits of the defense and of the prosecution and it may direct the District Court to conduct a hearing in which the jury is asked whether the judge influenced them.

As this Court did in Jackson v. United States, 117 U.S. App. D.C. 329, 329 F.2nd 893 (1964), appellant asks the Court to examine the entire transcript.

The problem posed by our contention that the Court's tone and loudness of voice, his manner of questioning, and his facial expressions erroneously influenced the jury, or were likely to influence the jury is more difficult. The rule laid down by this Court in Billeci v. United States, 184 F.2nd 394, places upon defense counsel the duty of objecting at each point where such sound and visual effects are noticed. In the case now before the Court, no such objections appear to have been made. Yet, appellant urges the Court to consider the point, even though Billeci may have been thought to be controlling.

In support of our contention, we cite the improvements in the technique of the court reporting since 1949, the year of the Billeci trial. Now, many reporters use tape re-

corders and similar devices to aid their note taking.

Secondly, affidavits or a hearing on this issue might be clarifying.

Thirdly, the Billeci rule ought to be overturned as a harsh directive detrimental to the sound administration of justice. Trial lawyers have enough to do without moment-to-moment monitoring of the judge's inflections. The single instance of eyebrow raising by the judge may be hardly detectible and of scant damage. It is cumulative effect that does the damage. Moreover, the lawyer in the midst of trial does his client a disservice when he becomes querulous. Of course, it would be far better if the lawyer made his objections contemporaneously to the fault, or prior to the judicial instructions to the jury. However, if it be done at motion for a new trial as here, recollections are fresh enough.

III. REQUEST THEREFOR HAVING BEEN MADE IN GOOD TIME, THE COURT SHOULD HAVE PRODUCED A JURY PANEL THAT WOULD NOT HAVE SEEN THAT THE APPELLANT WAS IMPRISONED.

(Please read particularly Tr. 3-4 and Tr. 19)

Immediately prior to the trial and before the process of selection and swearing of the jury was begun, defense counsel noted that the jury panel in the Court had seen the defendant brought in from the cellblock, and a new panel was requested. The judge commented that the request should have come earlier, noted as did the defense that there was some confusion as to whether the defendant was listed as a prisoner. The judge refused to bring in a new panel, but later directed that henceforth the defendant be brought in before the jury and leave after the jury was out.

It is submitted that the judge acted improperly in the first instance and properly in the second instance.

One of the many laudable purposes of bail reform is to take defendants, as often as feasible, out of the position of being treated as prisoners in front of jurors. It is common knowledge that on request any judge will aid in seeing to it that a defendant need not wear prison garb. Handcuffs, manacles or other restraints are no longer used in our

District Court in front of the jury, except where absolutely necessary.

Ronald L. Goldfarb, author of Ransom stated in How To Defend a Criminal Case, (Published by American Trial Lawyers Association in a chapter entitled The Challenge of Bail Reform, page 129.) "We know, for example, that people who are denied bail plead guilty more often, that they are convicted more often, that they receive suspended sentences less often, that in other words the mere fact of denying bail begins a spiraling series of compounded injuries."

One is the public humiliation of appearing in a courtroom under guard. Second, there is the certain inference that while other defendants remain free, the appellant was in custody, which might indicate to the jury that he was a felon serving a sentence or/a is dangerous and unreliable person.

The trial judge obviously recognized this, but without explanation initially refused to comply with the defense request. That the judge changed his mind on his own initiative was laudable but in this case too late.

The prejudice was effected. (Blair v. United States, NO. 8474 US App. D.C., 136 F. 2nd 284; O'Shea v. United States, 400 F 2nd 78 (1st Circuit 1968).

The judge presumably might, through the procedure suggested by the above cases, have reduced the possibility of prejudice with the appropriate questions and explanations. He did not attempt this.

IV. THE JUDGE COERCED THE JURY AND INVADED ITS FUNCTION WHEN IT GAVE THE ESSENCE OF THE "ALLEN CHARGE" BEFORE THE JURY RETIRED.

(Please read Tr. 509-11)

It is appellant's contention that the trial court erred in applying the explosive medication of Allen before there was any indication of an impacted jury.

When defense counsel objected that the charge was coercive, the trial Court indicated his purpose, perhaps, when he answered:

> "Which side? The last time you complained the jury came in with a verdict of not guilty in fifteen minutes."

This Court has approved the Allen charge, in among other cases, Moore v. United States, 345 F. 2nd. 97 (1967), where the Court said that the "content and the manner of use demand scrutiny". Appellant urges the Court to once again examine Allen, in the context of this case, where, we contend, the judge exhibited the appearance of prejudice during the trial and where even before the jury began to deliberate, he suggested what must have seemed to the jury to be a majority vote transformed into unanimity for the sake of quick agreement.

Appellant urges the Court to follow Green v. United

States, 309 F.2nd 852 (13th Cir. 1967), where in a situation comparable to this the Court said: "in this case, the dynamite exploded before there was any reason to think the blasting was necessary! The trial judge gave the charge before the jury retired."

The Court voted its disagreement with Nick v. United States, 122 F. 2nd 330; State v. Doon, 225 Minn. 193, 30 N W 2nd 539, which said the effect was minimized when given early, and with People v. Chivas, 312 Mich. 384, 34 N W 22, and State v. Thomas, 342 F. 2nd 197, which made no such distinction.

In the case here, the dissenters on the jury, if there were any, were indeed "stifled" in a most hasty fashion by the Court.

Where the Allen charge is given properly as set forth for example in Criminal Jury Instructions (The Bar Association of the District of Columbia), the jury is told it has a duty to decide the case "if you can conscientiously do so" (underlining added). This ameliorates the harm to an extent.

The trial Court did not use the "if" clause to reduce the coercive effect. This compounded his error. Jenkins v. United States, 330 F. 2nd 220. (Dissenting opinion by Judge Wright, 1964). See Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L. Ed. 523 (1896).

V. THE NECESSARY ELEMENT OF NON-CONSENT WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

(Please read Tr. 35, 37, 39, 40, 41-44, 47 and 505.)

Farrar v. United States, 10[illegible] U.S. App. D.C. 204, 275 F. 2nd 363 (1960). The Farrar court reversed because it found the prosecutrix's story to lack credibility. Although there are differences in the two cases, base similarities remain. In the instant case, the prosecutrix twice went with the defendant into his bedroom, twice reclined on the bed with him, engaged in lovemaking with him, and then, she said, at the final moment she resisted and he slapped her into submission. The defense theory is that she became angry and reported rape when he could not withdraw in time and when he struck her after intercourse. As this Court said in Farrar;

"In light of all the conflicting evidence, this hypothesis seems to us at least as likely as any. With deference to those who think otherwise, we are obliged to say that in our opinion it cannot be regarded as proved beyond a reasonable doubt that the appellant was guilty of rape."

Moreover, prosecutrix readily admitted the fact of the enticement, if not that she intended her actions to be such, and there were witnesses to the fact that the door of the apartment was chain locked while the first bedroom activity

was going on.

It is significant that at no time during the trial was the prosecutrix asked nor did she ever testify that she resisted to the utmost of her power, or that she was in fear of her life or grave bodily harm, as required by law. Ewing v. United States, 77 U.S. App. D.C. 14, 135 F.2nd 633. McGuinn v. United States, 39 U.S. App. D.C. 197, 191 F.2nd 477.

Thus, the jury disregarded the judge's charge requiring the utmost resistance or fear of life or grave bodily harm.

Appellant urges that the proof of non-consent was inconclusive, at best.

VI. THE INDICTMENT WAS FATALLY DEFECTIVE IN THAT IT WAS SIGNED BY ONE PERSON WHO IS DESIGNATED FOREMAN WHILE THE PRESENTMENT UPON WHICH THE INDICTMENT WAS BASED WAS SIGNED BY ANOTHER PERSON DESIGNATED AS FOREMAN.

(Please see presentment and indictment.)

Gaither v. United States, Case No. 21,780, 22,148, United States Court of Appeals for the District of Columbia Circuit (Decided April 3, 1969 and On Petitions for Rehearing, Filed April 24, 1969) decided that the indictment procedure being followed in this jurisdiction violated Rule 6, Fed. R. Crim. P. in that it did not include approval of the indictment by the requisite 12 grand jurors. The ruling was initially prospective as to absolute dismissability and there was rebutability retroactively as to cases still to be tried. On rehearing, it was ruled that the presumption that pending indictments signed by the foreman would have been approved by the requisite 12 jurors was irrebutable.

The indictment of appellant long antedated Gaither. However, the Gaither case on rehearing did not decide whether an indictment signed by one foreman when the presentment was signed by another foreman is invalid and the question of prospectivity or retroactivity in a case such as this.

Factually, the records of the United States District Court will show that the deputy foreman of the Grand Jury signed the

indictment although he signed it under the title of foreman.

This is more than a technicality, since the record does not disclose why the true foreman did not sign the indictment. It is possible that the foreman did not vote in favor of the presentment, indeed may have been opposed to the presentment and voted against it. It is also possible that without the foreman, there were not the twelve votes required for either the presentment or the indictment.

It is submitted that the indictment either should be dismissed or the case remanded to the trial court for hearing as to whether, in accordance with Gaither, the indictment signed by the deputy foreman of the Grand Jury would have been approved by at least 13 jurors including the foreman and the deputy foreman.

CONCLUSION

Appellant urges the Court to reverse the conviction and sentence below, or alternatively to remand for a new trial.

Joseph Paull
Counsel for Appellant
(Appointed by the Court)